



# Classical Racism, Justice Story, and Margaret Morgan's Journey from Freedom to Slavery: The Story of Prigg v. Pennsylvania

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# Race Law Stories



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Ronald S. Sullivan Jr.

**Classical Racism, Justice  
Story, and Margaret  
Morgan's Journey from  
Freedom to Slavery: The  
Story of *Prigg v.*  
*Pennsylvania***

***Introduction***

Most readers will not recognize the name Margaret Morgan. She held no public office; she performed no grand public service; her name is not enshrined on any statues or memorials. No public encomia record her life's work for posterity. Instead, for the most part, Margaret Morgan led an ordinary life. After growing up on a Maryland farm with her mother and father, in her late teenage years she met and married a young man and moved away from the family home. In time, Morgan and her new husband relocated to Pennsylvania, bought a home, and raised several children together.<sup>1</sup> Indeed, Margaret Morgan might have been the type of person Ralph Waldo Emerson described as among the common lot—an ordinary citizen who is central to the well being of the American democratic experience.<sup>2</sup>

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<sup>1</sup> Joseph Nogee, *The Prigg Case and Fugitive Slavery, 1842–1850: Part I*, 39 *J. Negro Hist.* 185 (1954).

<sup>2</sup> See Ralph Waldo Emerson, *The American Scholar*, in *The Essential Writings of Ralph Waldo Emerson* 43, 43–64 (Brooks Atkinson ed., 2002). See also Jane Addams, *Democracy and Social Ethics* 9 (2002).

However, Margaret Morgan's story is far from ordinary: It is the story of *Prigg v. Pennsylvania*<sup>3</sup>—the first, and one of the most important, Supreme Court pronouncements on slavery.<sup>4</sup> Notwithstanding her quotidian accoutrements, Margaret Morgan was, as a formal legal matter, a Negro woman with “no rights which the white man was bound to respect. . . .”<sup>5</sup> Although she had lived most of her life in de facto freedom, married a “free Negro,” and moved with him to the free state of Pennsylvania, Morgan and her offspring were nonetheless subject to the whimsy of brute kidnappers. And so it was in 1837 that a lawyer, Edward Prigg, directed the abduction of Morgan and her children—forcibly moving them from Pennsylvania to Maryland, a slave-holding state—and thus consigned them to a life of slavery.<sup>6</sup>

Justice Story's holding in *Prigg* was controversial to say the least. First announcing that states had no authority to regulate the practices of slave catchers within their borders,<sup>7</sup> he then articulated a broad, unqualified common law right to reclaim runaway slaves—a right that was not subject to any regulatory authority or any form of process. The *Prigg* holding effectively facilitated the wholesale removal of blacks (many of whom were legally emancipated) to slave-holding states with little, if any, meaningful protections.<sup>8</sup> As a result, abolitionists regarded this decision as rabidly pro-slavery.

Even more controversial than the decision itself was the fact that it was authored by Justice Joseph Story, long thought to be a strong anti-slavery advocate.<sup>9</sup> Over the years, scholars have attempted to reconcile Justice Story's presumed anti-slavery ideals with his decidedly pro-slavery opinion in *Prigg*. This debate has largely been framed in terms of a wrenching conflict between Justice Story's moral disapprobation of slavery and his fealty to the rule of law, his role as a Justice, and principles of federalism.<sup>10</sup> But this putative moral-formal conflict may be

<sup>3</sup> 41 U.S. (16 Pet.) 539 (1842).

<sup>4</sup> Along with *Prigg*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), and *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) are commonly regarded as the three most important slavery cases decided by the Court. See Robert M. Cover, *Justice Accused* 166 (1975).

<sup>5</sup> *Dred Scott*, 60 U.S. (19 How.) at 407.

<sup>6</sup> Noegee, *supra* note 1, at 185, 190.

<sup>7</sup> *Prigg*, 41 U.S. (16 Pet.) at 622–26.

<sup>8</sup> Because *Prigg* construed the Fugitive Slave Act as precluding any process outside of its ministerial process, many lawfully emancipated blacks were captured and placed in slavery pursuant to the Act. See Noegee, *supra* note 1, at 195, 198.

<sup>9</sup> *Id.* at 194. See also R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 346–58 (1985). But see, Barbara Holden-Smith, *Lords of Lash, Loom, and Law: Justice Story, Slavery, and Prigg v. Pennsylvania*, 78 Cornell L. Rev. 1086, 1116 (arguing that Justice Story's anti-slavery reputation is “exaggerated”).

<sup>10</sup> Cover, *supra* note 4, at 238–43.

insufficiently descriptive. The aim of this chapter is to examine the traditional narratives that purport to explain *Prigg* and to suggest a new theoretical lens through which to understand the holding.

*Prigg* is best understood in light of its broad socio-philosophical context. The decision was issued at the height of “classical racialism”<sup>11</sup>—an essentialist theory of race that originated in the late eighteenth century. Under this theory, “races” are conceived of as distinct types (rather than biological variations) manifesting specific, genetically-linked character traits. These traits, in turn, are used to rationalize the race-based anti-egalitarian distribution of societal burdens and benefits.<sup>12</sup> Classical racialism naturalized social differences: non-whites were inferior as a result of their genes. “It’s in the blood,” the argument ran. This “natural” condition was used to justify the wholesale political, economic, social, and, for some, physical subordination of non-whites.<sup>13</sup>

Contrary to the claim that Justice Story faced a profound moral-formal conflict in *Prigg*, like many educated elites of his time, he was actually morally ambivalent on the issue of slavery. This ambivalence was animated by the norms of classical racialism. Rather than wrestling with a strong conviction that slavery was unjust, Justice Story simply weighed strong nationalistic values against his morally ambivalent stance on the legal subordination of blacks.

### ***Margaret Morgan: From Freedom to Slavery***

Neither history nor Justice Story’s *Prigg* opinion records much of Margaret Morgan’s life story. This should come as no surprise if Justice Story viewed Morgan as the personification of a stereotype rather than a person worthy of individual moral consideration.<sup>14</sup> Notwithstanding the dearth of historical record, a picture of Morgan’s life and experience can be cobbled together from various sources. We know, for example, that Morgan’s parents were a married couple owned by slaveholder John Ashmore.<sup>15</sup> Although Ashmore never formally emancipated Morgan’s parents, he allowed them to build a home and live in freedom on his

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<sup>11</sup> I borrow the term “classical racialism” from philosopher Paul C. Taylor whose recent book on the philosophy of race gives a remarkably clear, non-tendentious, and thorough philosophical analysis of race. Paul C. Taylor, *Race: A Philosophical Introduction* 43–47 (2004).

<sup>12</sup> *Id.* at 43–48.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 34.

<sup>15</sup> Thomas C. Hambly, Argument of Mr. Hambly, of York (Pa.) in the Case of Edward Prigg (1842), reprinted in 1 *Fugitive Slaves and American Courts: The Pamphlet Literature* 128 (Paul Finkelman ed., 1988).

Maryland estate.<sup>16</sup> As a result, Morgan grew up with the species of freedom that emancipated blacks experienced in the early nineteenth century.

At this point, however, the historical record gets fuzzy. Sometime after Ashmore died in 1824, then-Margaret Ashmore married Jerry Morgan, an emancipated black man from Pennsylvania.<sup>17</sup> The couple initially lived in Maryland but moved to Lower Chanceford Township, York County, Pennsylvania in 1832.<sup>18</sup> The couple had six children, some of whom were born in Maryland, a slave-holding state, while others were born in Pennsylvania, a free state.<sup>19</sup> The Morgans lived in Pennsylvania without incident until 1837, when Edward Prigg, Jacob Forward, Stephen Lewis, Jr., and Nathan Bemis seized Margaret Morgan and her six children, thus beginning their journey from freedom to slavery.<sup>20</sup>

The seizure was based on a claim of ownership made by Nathan S. Bemis, who was married to Susanna Ashmore Bemis, John Ashmore's daughter.<sup>21</sup> Three years before Ashmore died, he sold his considerable real estate interests to Susanna for a nominal price,<sup>22</sup> and upon Ashmore's death, his remaining personalty, including slaves, passed to his wife.<sup>23</sup> Significantly, Ashmore's will indicated that he owned "two slave boys, Tommy, age 12, and James, age 11," but the will failed to mention

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<sup>16</sup> Holden-Smith, *supra* note 9, at 1122. Ashmore, himself, regularly proclaimed that he had freed Morgan's parents. See Hambly, *supra* note 15, at 128.

<sup>17</sup> Holden-Smith, *supra* note 9, at 1122. See also Paul Finkelman, *Story Telling on the Supreme Court: Prigg v. Pennsylvania and Justice Joseph Story's Judicial Nationalism*, 1994 Sup. Ct. Rev. 247, 275.

<sup>18</sup> Finkelman, *supra* note 17, at 275.

<sup>19</sup> *Id.* It is not clear how many children Morgan had in Maryland and Pennsylvania. The historical evidence, however, allows us to make some inferences. The 1830 U.S. Census for Harford County, Maryland records that the Morgan family consisted of Jerry and Margaret, plus two "free black" children. *Id.* (quoting Manuscript Census for Harford County, Maryland, U.S. Census 394 (1830)). The constraints of biology suggest that it is unlikely (though technically possible) that Morgan had four children between 1830 and 1832. The special verdict of the Pennsylvania trial court, however, found that only one of Morgan's children was born in Pennsylvania. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 609 (1842). While this finding is physiologically possible, other accounts suggesting that Morgan had more than one child in Pennsylvania seem more accurate. See, e.g., Finkelman, *supra* note 17, at 274 (citing *Prigg* oral arguments in which Morgan's counsel stated that Morgan had "several" children born in Pennsylvania).

<sup>20</sup> See Finkelman, *supra* note 17, at 276.

<sup>21</sup> *Id.* at 275. (citing Deed of Conveyance from John Ashmore to Susanna Bemis, May 11, 1821 (on file with Harford County Historical Society)).

<sup>22</sup> Finkelman, *supra* note 17, at 275.

<sup>23</sup> *Id.*

either Morgan or her parents.<sup>24</sup> Morgan, accordingly, had at least three good defenses against Bemis's ownership claim. First, if Morgan was neither sold to Susanna Bemis, nor devised to Ashmore's wife, then the Ashmore family had no cognizable property interest in Morgan. Second, Morgan had a credible argument that Bemis did not have standing to initiate a removal proceeding against either her or her children. Even if the Morgans were fugitive slaves,<sup>25</sup> they were the property of Ashmore's widow, not Nathan and Susanna Bemis. Third, the fact that some of Morgan's children indisputably were born in Pennsylvania should have persuaded the court that those particular children were free and therefore not subject to seizure under the Fugitive Slave Act.<sup>26</sup> Justice Story, however, glossed over these facts, disregarded extant principles of antebellum federalism, and penned a far-reaching decision that granted an unqualified right of recaption to slave catchers.<sup>27</sup>

As for Margaret Morgan and her children, history does not provide a clear record of their fate. By one account, the Morgans were eventually taken to John Ashmore's widow and enslaved.<sup>28</sup> By another account, the family was sold to slave owners unrelated to the Ashmores.<sup>29</sup> Still other accounts simply lose track of the Morgans after the courts formally declared them slaves and they were transported to Maryland.<sup>30</sup> But whichever version is accurate, it is clear that Morgan and her children were suddenly thrust into a life of slavery. Indeed, it must have been nothing short of Kafkaesque for Margaret Morgan and her children to go to sleep one evening as free people, only to awaken the next morning as chattel.

### *The Fugitive Slave Act and Justice Story's Decision*

The *Prigg* court resolved the issue of whether states had any authority to regulate the removal of alleged runaway slaves within their borders. According to Justice Story's reading of the Fugitive Slave Act,

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<sup>24</sup> *Id.* (citing John Ashmore Inventory, No. 1672, Sept. 28, 1824 (on file with Harford County, Register of Wills)).

<sup>25</sup> See *infra* notes 79–82 and accompanying text for additional arguments that Morgan was free as a matter of law.

<sup>26</sup> Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793). I shall hereinafter refer to this Act as either the Fugitive Slave Act of 1793 or the Fugitive Slave Act. See also *infra* note 83 and accompanying text.

<sup>27</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842).

<sup>28</sup> Allen Johnson, *The Constitutionality of the Fugitive Slave Acts*, 31 Yale L.J. 161, 166 (1921).

<sup>29</sup> Holden–Smith, *supra* note 9, at 1123.

<sup>30</sup> *Id.*



the federal government alone had the power to regulate the recapture of runaways.<sup>31</sup> In this sense, the decision evinced a profoundly nationalistic jurisprudence that, in consequence, facilitated both the unencumbered reclamation of runaway slaves and the unfettered kidnapping of free blacks. A brief history of the runaway slave debate will explain why this is so.

Since at least 1629, the North and South had been at loggerheads over the interstate regulation of runaway slaves.<sup>32</sup> The Constitution, once ratified, did not provide much guidance. The so-called Fugitive Slave Clause (which never actually used the word “slave”) simply declared that “No Person held to Service or Labour in one State” and who escapes to another state shall be “discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”<sup>33</sup> The Clause did not define what constitutes a sufficient “claim” by setting forth the evidence minimally required to demonstrate that a person was “held to service” in a slave-holding state and the process by which such a person should be “delivered up.”

In 1793 Congress passed the Fugitive Slave Act to answer these questions, but the Act proved to be nearly as deficient as the Clause.<sup>34</sup> For one thing, the Act was largely ministerial, requiring almost no process.<sup>35</sup> It merely required the person claiming ownership to request a “certificate of removal” by bringing the arrestee before a judicial officer.<sup>36</sup> If granted, the certificate authorized the transportation of the alleged runaway. The proceeding was summary in nature and required little more than proof that the person in custody was the one named in

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<sup>31</sup> *Prigg*, 41 U.S. (16 Pet.) at 622.

<sup>32</sup> Holden-Smith, *supra* note 9, at 1116 & n.176 (“The earliest regulation is probably that found among the freedoms and exemptions granted by the West India Company in 1629 to the settlers of the colonies of New Netherlands.”).

<sup>33</sup> U.S. Const. art. IV, § 2, cl. 3.

<sup>34</sup> Holden-Smith, *supra* note 9, at 1087. Interestingly, like *Prigg*, the Fugitive Slave Act grew out of a dispute between Pennsylvania and a bordering slave-holding state, Virginia, regarding an alleged runaway slave. Three slave catchers, acting under the authority of the Fugitive Slave Clause, were indicted in Pennsylvania for violating a 1788 Pennsylvania law that proscribed “selling and disposing” black people as slaves, but the governor of Virginia refused to extradite the slave catchers. Pennsylvania and Virginia referred their dispute to President George Washington, who, in turn, referred the matter to Congress. Congress resolved the matter by promulgating the Fugitive Slave Act of 1793. See Holden-Smith, *supra* note 9, at 1116–17; see also *Prigg*, 41 U.S. (16 Pet.) at 539, 566–67.

<sup>35</sup> Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793).

<sup>36</sup> *Id.* § 3.

the warrant.<sup>37</sup> Additionally, nothing in the Fugitive Slave Act explicitly authorized the judicial officer to adjudicate an alleged runaway's claim that the slave owner did not have the legal right of reclamation.<sup>38</sup> Although the Act nowhere prevented courts from assessing the merits of the ownership claim, judges generally limited their role to a perfunctory review of the sworn testimony of the claimant or his agent as sufficient proof of ownership.<sup>39</sup>

The deficiencies in the Act actually facilitated the kidnapping of free blacks. Often, slave traders would knowingly target free blacks and then submit forged affidavits to the court.<sup>40</sup> A slave catcher merely had to aver that a black person was a runaway, and a judicial officer, history demonstrates, nearly always issued a certificate of removal.<sup>41</sup> Significantly, once a certificate was issued, it "served as conclusive proof against any claim to freedom by the captured person."<sup>42</sup>

In order to stem the tide of slave catchers kidnapping free blacks and selling them into slavery, some Northern states enacted so-called personal liberty laws to provide procedural protections for blacks who claimed they were emancipated. Accordingly, Pennsylvania enacted "An Act to Prevent Kidnapping" in 1820.<sup>43</sup> This anti-kidnapping law, in pertinent part, limited the class of state judicial officers authorized to issue certificates of removal. Moreover, the law required slave catchers to obtain an arrest warrant from a judicial officer *before* seizing the alleged runaway. Following seizure the slave catcher was required to bring the alleged fugitive before the same judicial officer who issued the warrant in order to seek a certificate of removal.<sup>44</sup> The aim of this legislation was to decrease the incidence of collusion between low-level, state judicial officers and slave catchers intent on illegally selling free blacks into slavery. By restricting authority to issue certificates to federal judges and high-level state court judges, the law achieved its desired effect. However, the Pennsylvania law also had the unintended—

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Holden-Smith, *supra* note 9, at 1118–19.

<sup>40</sup> *Id.*

<sup>41</sup> Thomas D. Morris, *Free Men All: The Personal Liberty Laws of the North, 1780–1861*, at 33–34 (1974). See also Holden-Smith, *supra* note 9, at 1119. Some judges even conspired with slave catchers to remove free blacks and sell them into slavery. *Id.*

<sup>42</sup> Holden-Smith, *supra* note 9, at 1119.

<sup>43</sup> See Noguee, *supra* note 1, at 191.

<sup>44</sup> This was Pennsylvania's second attempt to curb the kidnapping of free blacks. As discussed *supra* note 34, Pennsylvania's first attempt resulted in the promulgation of the Fugitive Slave Act.

or, as many Southerners believed, intended—effect of obstructing the lawful removal of enslaved fugitives,<sup>45</sup> as there simply were not enough eligible judges to hear the volume of cases brought under the Fugitive Slave Act.<sup>46</sup>

Pennsylvania's neighboring slave states began to complain that its anti-kidnapping law was "tantamount to 'an act of emancipation itself.'" <sup>47</sup>In 1826, in response to such complaints, Pennsylvania amended its anti-kidnapping statute to broaden the category of judicial officers authorized to issue certificates of removal to include, for example, aldermen and justices of the peace.<sup>48</sup> Significantly, however, the revised version retained meaningful procedural protections for seized blacks and criminal penalties for those illegally removing blacks from Pennsylvania.<sup>49</sup> In particular, the statute required that the judicial officer permit an alleged runaway to challenge the putative slave holder's claim of ownership.<sup>50</sup> This minimal process was manifestly different from the summary proceeding provided for by the Fugitive Slave Act; it was this gap in procedural safeguards that gave rise to the dispute in *Prigg*.

The conflict between Pennsylvania and Maryland over the disposition of Margaret Morgan was emblematic of a larger conflict between the North and South over the capture of alleged runaway slaves. From the perspective of Northern states, personal liberty laws like the 1826 anti-kidnapping law at issue in *Prigg* were necessary to protect the liberty interests of the state's free black citizens. But from the South's perspective, these anti-kidnapping laws created unreasonable procedural obstacles for slave owners attempting to regain their lawful property. For Southerners, these obstructionist tactics were exemplified by a Vermont judge who, when asked what would constitute sufficient proof of fugitive status under the Fugitive Slave Act, replied: "a bill of sale from the Almighty God."<sup>51</sup> Such comments suggested that the North had embarked on a campaign to undo slavery despite its constitutionally protected status. For every example of kidnapping schemes in which free blacks were sold into slavery under the Fugitive Slave Act, the South

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<sup>45</sup> Some Northern legislators clearly intended personal liberty laws to thwart lawful attempts to remove enslaved persons. Morris, *supra* note 41, at 33–34.

<sup>46</sup> Holden-Smith, *supra* note 9, at 1120.

<sup>47</sup> *Id.* (quoting Noguee, *supra* note 1, at 192).

<sup>48</sup> Act of Mar. 25, 1826, ch. L, § 9, 1826 Pa. Laws 150 (1826).

<sup>49</sup> See *id.* § 3 (describing the warrant application process required before seizing "slaves"); *id.* § 4 (outlining the requirements for a warrant); *id.* §§ 1, 2 (outlining applicable punishments).

<sup>50</sup> *Id.* § 7 (setting forth the right to delay hearing to prepare testimony and evidence).

<sup>51</sup> Noguee, *supra* note 1, at 190.

cited examples of Northern judges, like the one in Vermont, who effectively blocked their right of reclamation.<sup>52</sup> These tensions threatened to pull apart the infant nation; *Prigg*, therefore, was integral to preserving the stability of a teetering union.

The circumstances that gave rise to *Prigg* began to take shape once Edward Prigg petitioned York County, Pennsylvania justice of the peace Thomas Henderson to issue an arrest warrant for Margaret Morgan and her children. Per the 1826 statute, once Prigg executed the warrant, he brought the Morgans before Henderson to request a certificate of removal.<sup>53</sup> Henderson, for some reason not reflected in the court record, declined to issue the certificate.<sup>54</sup> Nonetheless, without the required certificate of removal and in violation of Pennsylvania law, Prigg transported the Morgans to Maryland and into a life of slavery.<sup>55</sup> Soon thereafter, a Pennsylvania grand jury indicted Prigg and his co-defendants for violating the anti-kidnapping law. Maryland, however, refused to extradite the men to Pennsylvania.<sup>56</sup> After an extensive, two-year negotiation between the two states, Pennsylvania passed a law that required only one of the kidnappers, Edward Prigg, to be tried by a Pennsylvania jury. Prigg did not have to appear in person, and the trial would proceed on the basis of a set of facts stipulated by the parties.<sup>57</sup> Under the agreement, Pennsylvania would not enforce any adverse judgments against Prigg until the matter was resolved by the appellate courts, up to and including the United States Supreme Court.<sup>58</sup>

In 1842, the Supreme Court's decision in *Prigg* did resolve the dispute between Pennsylvania and Maryland—and, more generally, the dispute between the North and South—respecting the recapture of alleged runaways. Writing for the majority, Justice Story held Pennsylvania's law invalid because it was preempted by the Fugitive Slave Act of 1793.<sup>59</sup> The federal law, Justice Story reasoned, proscribed *any* state from passing *any* law that could obstruct slave catchers from reclaiming fugitive slaves.<sup>60</sup> The only process provided for under the Fugitive Slave Act was a summary proceeding to determine whether the alleged runa-

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<sup>52</sup> *Id.* at 185–92.

<sup>53</sup> Holden-Smith *supra* note 9, at 1122.

<sup>54</sup> *Id.*

<sup>55</sup> See Finkelman, *supra* note 17, at 276; *supra* text accompanying note 20.

<sup>56</sup> Holden-Smith, *supra* note 9, at 1123–24.

<sup>57</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 557–58 (1842).

<sup>58</sup> *Id.* at 609.

<sup>59</sup> *Id.* at 622–25.

<sup>60</sup> *Id.*

way was the same person described in the warrant.<sup>61</sup> Even more significant, Justice Story articulated a broad common law right of recaption enjoyed by slave owners, which permitted them to engage in self-help—even contrary to the requirements of the Fugitive Slave Act—in order to reclaim runaway slaves.<sup>62</sup> As such, even if Prigg violated the Act by failing to secure a certificate of removal, his actions were nonetheless lawful based on this broadly construed right of recaption.<sup>63</sup> Justice Story's opinion was remarkable in both its pro-slavery reach and its effect on blacks, both free and fugitive. *Prigg* shattered any procedural barriers to the removal of blacks from free states to slave states.

### *Critiques of Justice Story's Opinion*

Scholars have uniformly denounced Justice Story's opinion on ethical, jurisprudential, and formal-legal grounds.<sup>64</sup> In doing so, these critiques have presumed that Justice Story was torn between his sense that slavery was wrong and his belief that the law must be upheld. A few commentators have questioned just how deep his anti-slavery commitments ran, in part because he so readily sacrificed them to the imperatives of the rule of law. Yet whatever the reasons for taking Justice Story to task, none of the existing scholarship examines *Prigg* through the lens of Enlightenment race-thinking, particularly the racial metaphysics that philosopher Paul Taylor labels "classical racialism."<sup>65</sup> This failure to place *Prigg* in the context of the prevailing racial ideology of the time has resulted in critiques and explanations that are partial at best.

Most legal academic commentators criticize the *Prigg* opinion along an *ethical* dimension. The most articulate of these critiques comes from Professor Robert Cover's seminal work, *Justice Accused*,<sup>66</sup> in which he claims that Justice Story and other nineteenth-century Northern judges suffered from a moral-formal dilemma in attempting to resolve slave cases. That is to say, these judges upheld pro-slavery legal rules, even when such rules offended their personal moral sensibilities. During this time, positivism replaced natural law as the proper foundation for judicial decisionmaking. Where explicit sources of law existed, such as constitutions or statutes, judges deemed themselves bound by such

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<sup>61</sup> *Id.* at 617.

<sup>62</sup> *Id.* at 613.

<sup>63</sup> *Id.*

<sup>64</sup> See Ronald M. Dworkin, *The Law of the Slave-catchers*, Times Literary Supplement 1437 (Dec. 5, 1975); Holden-Smith, *supra* note 9, at 1134–47; Finkelman, *supra* note 17, at 255–73.

<sup>65</sup> Taylor, *supra* note 11, at 43–47.

<sup>66</sup> Cover, *supra* note 4, at 8.



sources, whether or not they agreed with them. Hence, the dilemma: Should judges be guided by their moral sensibilities or by their fealty to positive law? Under a positivist regime, the answer was clear: Even if slavery was antithetical to his personal morality or the natural law, a judge's duty was to follow the explicit sources of law. As Cover puts it, the "tradition of positivism meant the judge ought to be will-less."<sup>67</sup>

Another analysis of Justice Story's opinion advances a *jurisprudential* critique. Ronald Dworkin, for instance, argues that the moral-formal dilemma did not force judges to uphold slavery. For Dworkin, moral principles do not exist exclusively within the domain of natural law, but rather, can additionally be used to interpret positive law.<sup>68</sup> According to Dworkin, Justice Story made a jurisprudential mistake in deciding *Prigg*: He could have concluded that the Constitution contained deep-rooted values central to any competent understanding of the document.<sup>69</sup> Individual freedom certainly would qualify as a central constitutional value undermined by the institution of slavery. Moreover, Dworkin concludes, norms of procedural justice required more protection than the Fugitive Slave Act offered and were not antagonistic to state procedural safeguards like those erected by the Pennsylvania law.<sup>70</sup>

Dworkin's jurisprudential account is not wholly in conflict with Cover's descriptive account of Story's dilemma. Dworkin explains how judges should have (or could have) conceived of their role in the face of pro-slavery legal rules, but he does not speak to how judges actually conceived of their roles. In fact, both Cover's and Dworkin's accounts spring from the same root. Underlying both accounts is the assumption that a strictly textual reading of the Fugitive Slave Act required (or, at least, credibly supported) the pro-slavery *Prigg* opinion. For Cover, this result derived from fealty to formal, neutral principles of legal interpretation. For Dworkin, Justice Story's opinion resulted from an impoverished jurisprudence. For both, putting moral considerations to one side, the Fugitive Slave Act required that the Court overturn Edward Prigg's conviction.

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<sup>67</sup> *Id.* at 29.

<sup>68</sup> Dworkin, *supra* note 64.

<sup>69</sup> See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 768 (1999) (arguing that we may infer certain principles from "deep constitutional intuitions" that inhere in the Constitution).

<sup>70</sup> In his intellectual biography on Justice Story, R. Kent Newmyer proposes yet another jurisprudential critique of Justice Story's slave cases, claiming that Justice Story relied, to his detriment, on Enlightenment rationalism as sufficient to resolve moral conflict. In Newmyer's view, Justice Story did not suffer from a moral failing, but rather the pitfalls of too robust a rationalism. Newmyer, *supra* note 9, at 245–46.

Recently, some scholars have challenged both Cover's and Dworkin's explanations by introducing a *formal-legal* critique of the *Prigg* decision. This critique does not accept the claim that the positive law required Justice Story to endorse slavery.<sup>71</sup> Even assuming the limits of positivism, these scholars maintain that the opinion employed poor legal reasoning, selective use of the facts, and a thin analysis of history to support an excessively pro-slavery opinion. According to this view, Justice Story drafted an intentionally pro-slavery opinion owing to his nationalistic values and jurisprudence.<sup>72</sup> Significantly, some scholars even reject the common assumption that Justice Story held substantial anti-slavery allegiances. Justice Story believed strongly in property rights and expansive national power, the argument goes, but he did not hold the abolitionist values commonly ascribed to him.<sup>73</sup> These scholars instead believe that Justice Story used abolitionist rhetoric in order to advance his interests in maintaining Northern hegemony in the face of increasing Southern political power.<sup>74</sup> Formal-legal critiques of Justice Story's *Prigg* opinion fall into three categories, each of which I discuss in turn: (1) his misguided analysis of the common law right of recaption, (2) his dismissive treatment of the Morgans' claims to freedom, and (3) the opinion's unnecessarily wide-ranging scope.

### ***Common Law Right of Recaption***

Much of Justice Story's opinion is based on a suspect understanding of the Fugitive Slave Clause's centrality to discussions held during the Constitutional Convention. In order to support his broadly articulated common law right of recaption, Justice Story claimed that the Fugitive Slave Clause was a necessary compromise between the North and South—one that was fundamental to the birth of the nation. As a result, the right of recaption derived from the Constitution itself.<sup>75</sup>

Although the South sought to protect its interest in slavery during the constitutional debates leading to ratification, there is little evidence that anyone at the Constitutional Convention "considered the Fugitive Slave Clause to be a particularly important part of the constitutional bargain over slavery."<sup>76</sup> The Clause was discussed at the Convention only

<sup>71</sup> See, e.g., Holden-Smith, *supra* note 9, at 1091 (arguing that Story's anti-slavery reputation is "seriously overblown"); Finkelman, *supra* note 17, at 255–73.

<sup>72</sup> Holden-Smith, *supra* note 9, at 1134–39.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1147.

<sup>75</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 611 (1842). Interestingly, the concurring opinions all assumed this unsupported historical conception. *Id.* at 626–58.

<sup>76</sup> Finkelman, *supra* note 17, at 264.

once and was adopted without debate or objection.<sup>77</sup> Even more significantly, the Clause was never mentioned in the Federalist Papers. In investing the Clause with such deep significance, Justice Story appears to have conflated the robust and, at times, acrimonious debate surrounding the “three-fifths” clause with the adoption of the Fugitive Slave Clause. The South certainly understood the Clause as a victory but did not view it “as either a major component of the constitutional bargain or as something that would lead to federal enforcement.”<sup>78</sup> On this record, Justice Story’s conclusion that the Constitution mandates an unfettered common law right to reclaim runaways is profoundly exaggerated.

### ***The Morgans’ Claims to Freedom***

Perhaps most troubling about Justice Story’s opinion is its refusal to engage substantive questions regarding the Morgan family’s claims that they were properly emancipated. First, and most obviously, the Morgan children born in Pennsylvania (a free state) had good arguments that they were free and therefore not subject to reclamation. Though Morgan’s lawyer, Thomas C. Hambly,<sup>79</sup> argued that “several” of the Morgan children were born there,<sup>80</sup> Justice Story devoted a grand total of one line to the children, simply asserting that only one child was born in Pennsylvania. Justice Story never wrestled with the status of this child, nor did he explain how the Court determined that no other child was born in Pennsylvania. He might have concluded that emancipated status derived from the status of the parent rather than from birth in a particular state, but his opinion was silent on this issue.<sup>81</sup>

As to Morgan herself, Justice Story’s opinion provided no avenue to challenge the presumed status of a fugitive slave. According to Justice Story, slave owners had an unqualified right of recaption that could not be abridged by any state process whatsoever. But the opinion does not

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<sup>77</sup> Holden-Smith, *supra* note 9, at 1129. Even on this occasion, the discussion was not at all robust. Pierce Butler and Charles Pinckney, both of South Carolina, made a motion to amend the Constitution, which was met with two minor objections. The following day, Butler and Pinckney introduced the extant language for the Fugitive Slave Clause without objection or discussion. *Id.*

<sup>78</sup> Finkelman, *supra* note 17, at 263. “None of the supporters . . . at the Convention intimated that the Fugitive Slave Clause was a fundamental part of the bargain. Rather, they pointed to it as a plus for the South, but not as a major clause.” *Id.*

<sup>79</sup> Thomas Hambly did not earn a noteworthy place in history, even though he argued such an important case. The most significant nugget that history records on Hambly’s life is that he edited a newspaper called the *York Republican* as late as 1832. See [http://www.ydr.com/op-ed/ci\\_3404345](http://www.ydr.com/op-ed/ci_3404345).

<sup>80</sup> See Act of Mar. 1, 1780, 1780 Pa. Laws, § III.

<sup>81</sup> Finkelman, *supra* note 17, at 280 (noting that pre-*Prigg* case law established that a child born in the Commonwealth was free).

mention—even once—the competing right of free states to protect free black citizens from kidnapping. If Justice Story was correct that the Fugitive Slave Clause provided for at most a ministerial summary process, then blacks identified as runaways had no recourse in their home state to argue that they had been properly emancipated. Indeed, some state decisional law supported such a claim.<sup>82</sup>

### *The Scope of Justice Story's Opinion*

Finally, and by way of summary, Justice Story's opinion is notoriously overbroad. Were Justice Story the anti-slavery advocate he and others claimed to be, he could have drafted a much narrower opinion. Take, for instance, the common law right of recaption. In Justice Story's words, the Fugitive Slave Clause "manifestly contemplates the existence of a positive, unqualified right" of reclamation.<sup>83</sup> Justice Story reasoned that the right of recaption derived from the Constitution itself, and that even the minimal process prescribed by the personal liberty laws offended slave-owners' right of recaption. He could have declared the Pennsylvania personal liberty law unconstitutional without announcing a sweeping right of recaption that, in effect, removed any protection whatsoever for free blacks kidnapped into slavery. Such a broad and unsupported reading of the Fugitive Slave Clause, critics argue, does not comport with Justice Story's reputation as an anti-slavery jurist.

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My aim here is to be somewhat agnostic in regard to the merits of these competing critiques, except to say that each raises concerns that deserve careful attention.<sup>84</sup> Justice Story refused to consider serious anti-slavery arguments, an omission that has vexed scholars for years. So, what motivated him to write *Prigg* in the way that he did? Cover's ethical theory seems insufficient in light of the substantial formal-legal critique, which questions the integrity of Justice Story's legal reasoning. For Cover's theory to be correct, there must have been a dilemma—a conflict between the judge's personal morality and the perceived requirements of the law. The formal-legal critique undermines the notion that Justice Story was formally constrained by existing law in drafting *Prigg* in the exceedingly pro-slavery vocabulary he employed. Cover's analysis assumes that Justice Story was an anti-slavery proponent, but the record is not so clear and there are compelling counter-narratives that explain

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<sup>82</sup> See, e.g., *State v. Harden*, 2 Spears (SC) 151 (1832). But see *Walkup v. Pratt*, 5 H. & J. 51, 56 (Md. 1820) (rejecting the argument that living as a free person could establish status as free person).

<sup>83</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842).

<sup>84</sup> For a more detailed critique of Story's opinion, see Holden-Smith, *supra* note 9, at 1128–34, and Finkelman, *supra* note 17, at 255–73.

Justice Story's failure to condemn slavery and to deter the kidnapping of free blacks.<sup>85</sup> Dworkin's jurisprudential critique similarly fails to offer an adequate explanation of *Prigg*. Dworkin assumes, as does Cover, that Justice Story wrote an honest opinion consistent with his perception that he was bound by law to uphold slavery. Here again, the formal-legal critique suggests otherwise.

So, might the formal-legal critique offer the better explanation—that Justice Story's desire to fortify national power simply trumped his abolitionist leanings? This form of argument may offer a partial explanation: Justice Story was committed to nationalistic values above all others, including his abolitionist beliefs. Although this argument offers a plausible explanation, it does not speak to how an abstract collective value like nationalism can co-exist with a dehumanizing institution like slavery.<sup>86</sup> The existing literature merely makes the naked claim without telling us why.

None of these critiques provides a coherent theory that explains why Justice Story wrote *Prigg* in such fervently pro-slavery vocabulary. The focus on jurisprudence, constitutional values, and legal reasoning does not adequately account for his profound subordination of the dignitary harms associated with the kidnapping of free blacks and the slave trade in general. *Prigg*'s grant of absolute authority to slave catchers to seize blacks—free or enslaved—signified more than fealty to certain nationalist norms. The pro-slavery tenor of the decision starkly revealed what race meant to Justice Story. Accordingly, the better way to understand *Prigg* is to locate the opinion in the broader discourse of classical racialism, which treated the inferiority of blacks as natural and inevitable.

### *Classical Racialism and Justice Story*

Justice Story reached his intellectual maturity in the early to mid-nineteenth century, an historical moment defined by classical racialism—a brand of racial metaphysics that can best be understood in both semantic and structural vocabularies. Semantically, classical racialism assigns non-physical meaning to bloodlines, so that blackness is equated with irrationality, incivility, incompetence, and, thus, inferiority. Structurally, classical racialism works to rationalize the unequal distribution of societal benefits and burdens by establishing the ideological foundation for comprehensive racial domination.<sup>87</sup> This form of race-thinking,

<sup>85</sup> See *infra* text accompanying notes 132–134.

<sup>86</sup> Significantly, one variant of the formal-legal critique makes the claim that Justice Story did not hold strong commitments to abolitionist values at all. Holden-Smith, *supra* note 9, at 1091–1116.

<sup>87</sup> Taylor, *supra* note 11, at 24–25.



which may sound commonplace to the modern reader, represented a paradigmatic shift in the etiology of race in Western culture.<sup>88</sup>

### *The Origins of Classical Racialism*

The human population is made up of smaller populations that have distinctive physiological and cultural characteristics.<sup>89</sup> From time immemorial, people have recognized these physiological differences, including skin color, height, and body shape, but the concept of race is a relatively new phenomenon in human history.<sup>90</sup> Pre-modern people “lived in a world of multiple peoples, rather than a world of a few races.”<sup>91</sup> They often saw the world in “we/they” terms—cultured-us versus barbaric-them, Christian-us versus heathen-them, or believer-us versus infidel-them, for example.<sup>92</sup> Some ancient cultures, to be sure, equated skin color with primitivism; that is, they understood color as a marker for traits deeper than history or socialization.<sup>93</sup> But, the pre-moderns did not think in terms of *heritable* character traits, largely because they were not yet availed of the requisite scientific resources. Different looking people were different (and consequently deemed superior or inferior) for a host of reasons, including their religion, culture, climate, and locality. As philosopher K. Anthony Appiah puts it, “the physical body was important not as a cause but as a *sign* of difference.”<sup>94</sup> In other words, the idea of inferior character, intelligence, ratiocination, and so forth, passing through bloodlines is a modern creation—one that did not come into existence until the late eighteenth century.<sup>95</sup>

<sup>88</sup> As philosopher K. Anthony Appiah points out, “current ways of talking about race are the residue, the detritus, so to speak, of earlier ways of thinking about race; so that it turns out to be easiest to understand contemporary talk about ‘race’ as the pale reflection of a more full-blooded race discourse that flourished in the last century.” K. Anthony Appiah & Amy Gutmann, *Color Conscious: The Political Morality of Race* 38 (1996).

<sup>89</sup> Taylor, *supra* note 11, at 20–21. Physical anthropologists have long since discarded the term “race” in favor of “populations” to describe forms of human variation. Race as a category proved to be far too imprecise and problematic a construction. *Id.*

<sup>90</sup> Prior to the fifteenth century, populations rarely interacted. Geography accounted for the generational replication of physiognomy and cultural practice. *Id.*

<sup>91</sup> *Id.* at 22.

<sup>92</sup> Aristotle, for example, theorized that male, aristocratic Greeks had superior reasoning abilities and, thus, were cultured as opposed to the barbaric non-Greek population. See Aristotle, *Politics* 63 (H. Rackham trans., 1944). The idea of “race” as we understand it today is nowhere to be found in Aristotle’s thinking.

<sup>93</sup> By way of example, the Chinese understood “the darker skin of the residents of Africa and South Asia, as well as the ‘ash-white’ skin of Europeans, as a sign of inferior culture and debased humanity.” Taylor, *supra* note 11, at 22.

<sup>94</sup> Appiah & Guttmann *supra* note 88, at 50.

<sup>95</sup> The idea that we have not always understood human variation in the vocabulary of race is fairly well established. See Georges-Louis Leclerc, *A Natural History, General and*

Early notions of race began to form in the late fifteenth century around a number of world events that conspired in significant ways. One such event was the culmination of the *Reconquista*, when Ferdinand and Isabella expelled the last Moorish rulers from the Iberian Peninsula. As the Spaniards began to interact with other cultures on the peninsula, they developed deep-seated suspicions that the Moors and Jews (even those who had converted to Christianity) were somehow different—more than just culturally.<sup>96</sup> Though initially no vocabulary existed to give voice to this suspicion, over time, the Spaniards began to appropriate a vocabulary used by Southern Europeans to describe breeds of animals. Indeed, when the first Spanish dictionary was published in 1611, the term “*raza*”—the etymological origin of the word “race”—was defined as pointing both to “breeds of horses and, derisively, to people of Moorish or Jewish ancestry.”<sup>97</sup>

Thus, an important semantic shift began to emerge. Whereas before, inferior status was associated with a geographic region, religion, or culture, the vocabulary of race allowed for the correlation of character traits with groups of people who shared certain biogenetic traits. This new form of race-talk took hold in the Americas during the period of European colonialism ushered in by Christopher Columbus’s “discovery” of the Americas. This was the first time in history in which “vastly different peoples and cultures came together . . . with some of those peoples appropriating the land and labor of some of the others on an unprecedented scale.”<sup>98</sup> The notion of inferior and superior *razas* provided ideological content for the “right” to take “unused” land from backward and uncivilized *razas*.

This era—let’s call it early-modern racialism—reached its conceptual maturity in 1684 with Francois Bernier’s famous essay, *A New Division of the Earth*, in which Bernier introduced his theory that there were four or five different species of humans.<sup>99</sup> Bernier rejected the then-dominant understanding of human classification based on geography<sup>100</sup> and replaced it with a classification system based on physiognomy—roughly, hair texture, nose and face shape, and, of course, skin color.

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Particular, in *Race and the Enlightenment* 15–28 (Emmanuel Chukwudi Eze ed., 1997); George M. Fredrickson, *Racism* 99–108 (2002).

<sup>96</sup> Taylor, *supra* note 11, at 39–41.

<sup>97</sup> *Id.* at 41. In 1611, *Tesoro de la Lengua Castellano o Espanola* was first published containing the term “*raza*.” *Id.*

<sup>98</sup> *Id.* at 41.

<sup>99</sup> Bernier wavered between four or five because he could not decide whether Native Americans were white or some other species. Taylor, *supra* note 11, at 41–42.

<sup>100</sup> *Id.*

Bernier's theory, however, was monogenic; it presumed—consistent with Christian theology—that differences among populations represented variations from an ideal human type—white European. The further a human species varied from the ideal, the more inferior the species.

### *The Era of Classical Racialism*

The classical racialism era—the historical period in which Justice Story wrote *Prigg*—began to develop in the late eighteenth century. Three publications serve as illustrative marks of the era's formation: Immanuel Kant's *On the Different Races of Man*, Thomas Jefferson's *Notes on the State of Virginia*, and Samuel George Morton's *Crania Americana*.<sup>101</sup> During this era, the monogenic project of naturalizing human difference of the early-modern racialism period gave way to a polygenic project that catalogued humanity into several distinct types. No longer were different races a product of mere variation; different races were typologically distinct, carrying “the heritability of essential traits across generations.”<sup>102</sup>

#### *Immanuel Kant*

Philosopher Immanuel Kant played a leading role in the transformation of racial ideology. In 1775, Kant published *On the Different Races of Man*<sup>103</sup>—one of the most influential essays on race at the time<sup>104</sup>—which

<sup>101</sup> I use the phrase “illustrative marks” because these texts do not represent the breadth of Enlightenment thinking on race; rather, I chose these essays because, to my thinking, they best typify the important semantic shifts in Enlightenment racial discourse.

<sup>102</sup> Taylor, *supra* note 11, at 44.

<sup>103</sup> Immanuel Kant, *On the Different Races of Man*, in *This Is Race* 16 (Earl W. Count ed., 1950).

<sup>104</sup> See, e.g., *This Is Race*, *supra* note 103, at 704 (“Immanuel Kant produced the most profound racialological thought of the eighteenth century.”). Some modern scholars wrongly dismiss Kant's work on race as recreational, but Kant “devoted the largest period of his career to research in, and teaching of, anthropology and cultural geography.” *Race and the Enlightenment*, *supra* note 95, at 2. For examples of the dismissal or ignorance of Kant's work on race see, Hannah Arendt, *Lectures on Kant's Political Philosophy* 7 (Ronald Beiner ed., 1982); Howard Caygill, *A Kant Dictionary* (1995) (which contains no entry for “race”). In fact, at the University of Königsberg, where Kant spent his entire career, he taught many more courses in anthropology or geography (seventy-two) than in logic (fifty-four), metaphysics (forty-nine), moral philosophy (twenty-eight), or theoretical physics (twenty). *Race and the Enlightenment*, *supra* note 95, at 2–3. Indeed, Kant “introduced anthropology as a branch of study to the German universities,” and introduced “the study of geography . . . to Königsberg University.” Emmanuel Chukwudi Eze, *The Color of Reason*, in *Postcolonial African Philosophy* 104 (Emmanuel Chukwudi Eze ed., 1997). Kant also produced voluminous writings in this area: *Anthropology from a Pragmatic Point of View*, *Physische Geographie*, *Conjectural Beginning of Human History*, *Bestimmung des Begriffs einer Menschenrace*, and *Observations on the Feeling of the Beautiful and the Sublime*. *Id.* at 104. There are sufficient grounds to infer that Kant certainly took this part of his work

foreshadowed the semantic shift to the polygenic discourse of classical racialism. Drawing on the earlier work of Benier, Carl von Linné, George-Luis Leclerc, Comte de Buffon, and David Hume, Kant theorized that four distinct human types existed, each possessing a particular “natural disposition.”<sup>105</sup>

Between Benier’s publication in 1684 and Kant’s *On the Different Races of Man*, Enlightenment thinkers began to publish thicker accounts of Benier’s central monogenic thesis that four or five human species existed.<sup>106</sup> Significantly, the physiognomic differences among the races were explained by theoretical commitments to environmentalism—an explanatory framework that tied human differences, including cultural differences, to climate and geography.<sup>107</sup> So, for example, the form of argument ran: since regions of Africa are exceedingly hot, Africans are the darkest peoples, grow no beards, and have short curly hair.<sup>108</sup>

Kant, however, was not satisfied with what he deemed narrowly environmental or geographical accounts of race. He required a more transcendental and, to his mind, philosophical rendering. As such, Kant acknowledged these descriptive theories, but further theorized that races were caused by *anlagen*, or “natural dispositions.”<sup>109</sup> According to Kant, climate played a role in phenotypic expression only if a *keime*, or germ—that which is “inherent in the nature of an organic body”—already existed within the person to react with his environment in particular sorts of ways.<sup>110</sup> This “foresight of Nature,” Kant argued, provided peoples with “inner furnishings” to produce phenotypic varieties upon

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seriously, and did not understand himself to be writing mere journalistic pieces or conducting popular lectures on race.

<sup>105</sup> Kant, *supra* note 103, at 19.

<sup>106</sup> See *supra* note 102 and accompanying text.

<sup>107</sup> In 1735, for instance, Carl von Linné published *The System of Nature*, which articulated a then-popular Enlightenment notion that Nature (or Providence) assigned a precise position in nature to all living things. Carl von Linné, *The System of Nature, in Race and the Enlightenment*, *supra* note 95, at 10–14. David Hume published two important essays, *Of the Populousness of Ancient Nations* and *Of National Character* in 1748 and 1754, respectively. David Hume, *Of the Populousness of Ancient Nations, in Race and the Enlightenment*, *supra* note 95, at 29–30; David Hume, *Of National Character, in Race and the Enlightenment*, *supra* note 95, at 30–33.

<sup>108</sup> Comte de Buffon, *A Natural History, General and Particular, in This Is Race*, *supra* note 103, at 10–13. One early account theorized that blackness resided in the “cellular membrane” between the skin and the scarf-skin and that a long gestation in “hot water” causes the blackness. *Id.* at 13.

<sup>109</sup> Kant, *supra* note 103, at 19.

<sup>110</sup> *Id.*

interaction with the environment.<sup>111</sup> So, Africans, for example, reacted with their environment in the way that they did because it was their *anlagen* to do so. This *anlagen*, Kant reasoned, was Nature's plan, as "[c]hance or common mechanical laws could not have merely developed appropriately at long periods in various ways."<sup>112</sup>

Kant's thinking represents an important semantic intervention in the Enlightenment racial discourse. Talk of so-called *anlagen* was one of the first vocabularies to naturalize extant notions of hierarchical status among different peoples. It provided a quasi-scientific account of the Great Chain of Being—the notion of a divinely inspired hierarchy of species—which was more congenial to Enlightenment rationalist sensibilities than religious or mystical accounts. This scientific credence provided an additional vocabulary to justify white superiority and black inferiority. Kant's racial cosmogony was, however, firmly monogenic; he believed that blacks and whites belonged to the same species of humans.<sup>113</sup> That Kant espoused a theory of common ancestry is important because monogenism does not accomplish the same ideological work as polygenism. It is easier to subjugate a different sort of animal than it is to subjugate a mere variety of human being. So, at the height of the classical racialism era, Europeans used polygenic vocabularies to rationalize wholesale domination of other races. Such subjugation could be justified as the natural, scientifically proved order of things.<sup>114</sup>

### *Thomas Jefferson*

In analyzing how racial theories came to influence thinking in the United States, Thomas Jefferson is an important figure for three reasons. First, he was a central figure in the development of American democracy and the country's cultural understanding of itself. Second, Jefferson was a leading intellectual and, thus, represents the best thinking of his day in any number of areas, including the etiology of race. Finally, Jefferson's race-thinking is illustrative of the type of moral ambivalence toward the legal subordination of blacks that Justice Story probably felt.

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Kant argues that the environment may be able to alter a particular individual, but a specific *keime* is necessary to provide "generative force that would be capable of reproducing itself." *Id.* at 20.

<sup>113</sup> Without much argument, Kant writes, "Negroes and Whites are not different species of humans . . . but they are different *races*." *Id.* at 17 (emphasis in original).

<sup>114</sup> Kant's physical anthropological musings of black inferiority present an irony. Contemporary race theorists readily deploy familiar Kantian themes as a basis for a theory of rights with anti-racist implications. See generally Lewis R. Gordon, *Bad Faith and Antiracism* (1995).



A good starting point to understand Jefferson's race theory is Query XIV of *Notes on the State of Virginia*.<sup>115</sup> There, Jefferson advanced a "suspicion" (albeit with "great diffidence") that blacks "are inferior to the whites in the endowments both of body and mind."<sup>116</sup> Jefferson was not sure whether blacks were a typologically distinct race or were made different owing to their enslavement,<sup>117</sup> but he was certain that blacks were inferior in their reasoning abilities, imaginative capacities, potential for character development, and aesthetic potential.<sup>118</sup> Jefferson's suspicion, notably, used the vocabulary of early-modern racialism—races are *varieties* of humanity—and gestured toward classical racialism—races are *naturally* different.

Jefferson was convinced that blacks were not only intellectually inferior, but were also morally and aesthetically inferior. Indeed, Jefferson's *Notes* focused a good deal of attention on the aesthetic dimension of black inferiority. Jefferson made an interesting semantic move when he queried: "The circumstance of superior beauty is thought worthy of attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man?"<sup>119</sup> By conflating his aesthetic critique with the budding science of breeding, he provided additional building blocks for the shift to a polygenic discourse. That is, he injected the language of biology<sup>120</sup> into an existing racial discourse that included intellectual, moral, and aesthetic claims marked by color. This semantic shift, in turn, strengthened ideological beliefs that inferior species of men deserved their subordinate status.

<sup>115</sup> Thomas Jefferson, *Notes on the State of Virginia* (William Peden ed., Univ. of N.C. Press 1955) (1781).

<sup>116</sup> *Id.* at 143.

<sup>117</sup> *Id.* ("I advance it therefore as a suspicion only, that the blacks, whether originally a distinct race, or made distinct by time and circumstances, are inferior to the whites in the endowments of body and mind.").

<sup>118</sup> Jefferson wrote, "Comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; in reason much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous." *Id.* at 139. Of Phyllis Wheatly, widely regarded as the first black poet, Jefferson remarked, "Religion indeed produced [her]; but it could not produce a poet. The compositions published under her name are below the dignity of criticism." *Id.* at 140.

<sup>119</sup> Jefferson, *supra* note 115, at 138.

<sup>120</sup> In the vocabulary of the time, "biology" was referred to as "natural history." The term "biology" was popularized in 1802 in a treatise by Gottfried Treviranus and Jean-Baptiste de Lamarck. Appiah & Gutmann, *supra* note 88, at 49 n.23 (citing William Coleman, *Biology in the Nineteenth Century: Problems of Form, Function and Transformation* 1 (1971)).

However, even though Jefferson held a firm belief that blacks were inferior to whites, he was nonetheless a proponent of emancipation.<sup>121</sup> Indeed, in adopting the Declaration of Independence, the Continental Congress deleted pro-emancipation language from Jefferson's original draft.<sup>122</sup> So, how can Jefferson's firm emancipative sentiments be squared with his equally strong conviction that blacks are subordinate? (We may also ask, as a related question, how he could harmonize his status as a slave owner with his advocacy of emancipation.) For Jefferson, racial differences made it impolitic for the races to live together under the same government,<sup>123</sup> and his solution was to deport blacks to "such a place as the circumstances of the time should render the most proper."<sup>124</sup> Yet, this pragmatic solution to a political problem did not speak to how he could be, simultaneously, both an abolitionist and a firm believer in black inferiority.

My suspicion—advanced without much diffidence—is that Jefferson did, in fact, hold both positions, but that his belief in black inferiority (and his attendant "suspicion" that such inferiority was heritable) was more deeply held than any egalitarian racial sentiments. The mistake that many scholars make is to presume (on fairly thin supporting evidence) that Jefferson's abolitionist leanings stood in relative equipoise with his other normative commitments. In fact, Jefferson's suspicion that blacks were inferior—either genetically or environmentally—rendered him ambivalent about their enslaved status, in much the same way that I argue Justice Story was ambivalent about the suffering of alleged fugitive slaves.

#### *Samuel George Morton*

Offering putatively scientific proof that blacks were typologically different than whites—a difference that explained blacks' natural inferiority in intellect and character development—Samuel George Morton is central to understanding Justice Story's decision in *Prigg*. Kant's musings in 1775 and Jefferson's suspicions in 1787 matured into recogniz-

<sup>121</sup> Appiah & Gutmann, *supra* note 88, at 42 (quoting Thomas Jefferson, *Autobiography*, in *Thomas Jefferson, Writings* 1, 18 (Merrill D. Peterson ed., 1984)) ("Nothing is more certain in the book of fate than that these people are to be free.").

<sup>122</sup> *Id.* at 43 (The "Christian king of Great Britain . . . violat[ed] the most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating & carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.").

<sup>123</sup> Jefferson followed his now-famous quote, "Nothing is more certainly written in the book of fate than that these people are to be free," with, "Nor is it less certain that the two races, equally free cannot live under the same government." Appiah & Gutmann, *supra* note 88, at 42.

<sup>124</sup> Jefferson, *supra* note 115, at 138.

ably scientific theorization in 1839 with Morton's publication of *Crania Americana*.<sup>125</sup> Morton's research was widely believed to have established that: (1) Environment did not contribute to the formation of races; (2) Races were typologically different and not derivative of a common stock; and (3) Demonstrable differences in cranial capacities among the races proved differences in intelligence.<sup>126</sup> It is this last claim that received the most attention. Morton's cranial research, which gained popular acceptance as a dispositive ranking of human types, provided the rationale for the government's management of racial populations. Morton's work also had a profound effect on U.S. foreign and immigration policy, and led—quite directly—to the eugenics movement, which featured the notorious race-thinking of the Nazi movement.

### *Justice Joseph Story*

By the mid to late 1800s, putatively scientific systems for distinguishing and ranking human types were firmly ensconced in the cultural ideology of the United States. As a result, the semantic shift to a full-blown polygenic discourse and attendant schemes for managing racial spaces were in place by the time Justice Story wrote his opinion in *Prigg*.<sup>127</sup> In arguing that Justice Story was impacted by this ideology, however, I must reconcile my claim with the popular view that he, like Jefferson, was an abolitionist.

Justice Story's reputation among scholars as a faithful abolitionist<sup>128</sup> derives primarily from two sources: a Grand Jury charge he delivered in 1819 and his opinion in *United States v. The La Jeune Eugenie*.<sup>129</sup> Justice Story's Grand Jury Instruction, delivered in Massachusetts and Rhode Island in 1819 and, once again, in Maine in 1820,<sup>130</sup> offered a heart-

<sup>125</sup> Samuel George Morton, *Crania Americana* (1839).

<sup>126</sup> See, e.g., Dr. Prichard, Book Review, 10 J. Royal Geographical Soc'y London 552, 561 (1841).

<sup>127</sup> See Taylor, *supra* note 11, at 39–43.

<sup>128</sup> See, e.g., Cover, *supra* note 4, at 119, 240; David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 245 (1985); Newmyer, *supra* note 9, at 377; Christopher L. M. Eisgruber, Comment, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. Chi. L. Rev. 273, 279 (1988).

<sup>129</sup> 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551). Professor Barbara Holden-Smith argues that biographers of Justice Story overwhelmingly rely on the 1819 Grand Jury instruction and *La Jeune Eugenie*, and that only two biographers, R. Kent Newmyer and Robert Cover, even mention other decisions to support his anti-slavery reputation. Cover, for example, mentions *United States v. Amistad*, 40 U.S. (15 Pet.) 518 (1841), as additional evidence, but “recognizes the limited nature of that victory for kidnapped Africans.” Holden-Smith, *supra* note 9, at 1099 n.80.

<sup>130</sup> Holden-Smith, *supra* note 9, at 1100 n.81. That Justice Story's anti-slavery reputation is based on so sparse a record is quite remarkable, particularly in light of the breadth and strength of such claims in the literature. See *supra* note 9 and accompanying text.

wrenching account of what the newly enslaved African population experienced during the trans-Atlantic journey to America.<sup>131</sup> Three years later, in 1822, Justice Story lamented the evils of the slave trade in *La Jeune Eugenie*, describing it as “a traffic conceived in atrocious and unfeeling cruelty; and sustained and sealed with blood.”<sup>132</sup>

Despite this stirring rhetoric, Justice Story may not have been motivated by abolitionist sentiments. The formal-legal critics provide a compelling counter-narrative that casts Justice Story’s anti-slavery vocabulary in a different light. At bottom, Justice Story may have used powerful anti-slavery rhetoric to advance not a moral principle, but a political goal—opposition to the Missouri compromise, an agreement between pro- and anti-slavery factions of the Congress, which regulated slavery in the western territories. Historical evidence, including Justice Story’s personal correspondence, suggests that around 1819 he became engaged in the national debate over the annexation of Missouri:

In opposing the Missouri Compromise, he indicated more than once that for him the question of the expansion of slavery was rooted in the conflict between New England and the South for hegemony over the national government. For him this was a contest of nationalism against confederation, a struggle for union over dis-union. For example, writing to Professor Edward Everett in 1820, Story complained that the South had gotten its way on the Missouri question by using the tactic “divide and conquer” against New England. He warned that the various political factions of New England must put their differences behind them and present a united front against the South.<sup>133</sup>

Justice Story’s anti-expansionist sentiments, however, certainly do not foreclose an anti-slavery sentiment. He could both favor New England’s political supremacy and be repulsed by the institution of slavery. So, why credit the formal-legal critique, which questions Justice Story’s abolitionist commitments? Sometimes silence speaks volumes. What is striking about Justice Story’s slavery jurisprudence is that he employed anti-slavery rhetoric only in temporal proximity to an annexation conflict; he did not make similar moral claims in any other slavery cases. Writing the remainder of his slavery opinions using a legalistic, unemotional vocabulary, Justice Story marshaled doctrine and relied on cold

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<sup>131</sup> See 1 *Life and Letters of Joseph Story* 341–42 (William Wetmore Story ed., 1851).

<sup>132</sup> *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822) (No. 15,551).

<sup>133</sup> Holden-Smith, *supra* note 9, at 1094. Justice Story objected to the annexation of Texas, as well, “suppl[ying] the anti-expansionist forces with the constitutional arguments against annexation.” *Id.* at 1093. According to formal-legal critics, Justice Story’s rhetoric in both instances was a mere pretext to preserve New England’s hegemony. *Id.* at 1093–94.

statutory analysis to arrive at results that were technically sound, even if they were morally questionable.<sup>134</sup>

In light of Justice Story's selective use of anti-slavery rhetoric, there is credible support for the claim that his words were born more out of political expediency than moral principle. His ability to subordinate principle to expediency reflects the racial metaphysics of classical racialism, which rationalized not just slavery, but other forms of oppression as well, including European adventurism in Africa, U.S. incursions in Hawai'i and the Philippines, and a robust eugenics movement. As in *Prigg*, these pernicious forms of exclusion often led to violent consequences.

The vocabulary of classical racialism—the result of a range of intellectual currents coming together over three centuries—justified the comprehensive racist domination of non-whites at an unprecedented level and to an unprecedented degree. Indeed, popular deployment of this vocabulary foreclosed the ability to attain any form of human solidarity, “the imaginative ability to see strange people as fellow sufferers.”<sup>135</sup> Blacks became “other”—a typologically inferior sort of species—enabling whites to discount the suffering that slavery entailed.

Justice Story's ambivalence about slavery involved more than merely holding inconsistent views about blacks;<sup>136</sup> it may be described as a particular moral psychology that permitted him to dehumanize blacks. Once blacks were stripped of their fundamental human dignity, classical racialism provided the rationale for Justice Story to uphold slavery while at the same time invoking founding ideals without any sense of inherent contradiction. Justice Story's ambivalence allowed him to debase and devalue an entire race of people without sacrificing his claim to being a good, decent, God-fearing person.

Justice Story's ambivalence, like that of other nineteenth-century thinkers, required what philosopher Charles Mills calls an “epistemology

<sup>134</sup> See *id.* at 1104–16 (analyzing Story's other slavery opinions and finding that they are “narrow in their reasoning and devoid of any mention of the immorality of the trade”).

<sup>135</sup> Richard Rorty, *Contingency, Irony, and Solidarity*, at xvi (1989).

<sup>136</sup> In the psychological literature, “attitude ambivalence” refers to an individual's simultaneously having both positive and negative opinions on the same object. See, e.g., Michael Riketta, *Discriminative Validation of Numerical Indices of Attitude Ambivalence*, 5 *Current Res. Soc. Psychol.* 65 (2000). Attitude ambivalence has been linked to racial attitudes. One study found that having attitude ambivalence toward members of another race (e.g., having feelings of both aversion and friendly concern) predicted polarized cross-racial evaluations. R. Glen Hass et al., *Cross-Racial Appraisal as Related to Attitude Ambivalence and Cognitive Complexity*, 17 *Personality & Soc. Psychol. Bull.* 83, 89–91 (1991). The vast literature on attitude ambivalence can provide insights into the mindset of nineteenth-century jurists, even though these modern psychological tools did not exist at the time.

of ignorance,” which rationalizes grossly unequal distributions of burdens and benefits.<sup>137</sup> According to Mills, this epistemology of ignorance is the foundation of what he terms the “Racial Contract,” a theoretical framework for understanding racial domination as a distinct subject of moral and political philosophy, much like ideas of aristocracy, liberalism, socialism, and welfare capitalism.<sup>138</sup> The structure of racial domination, he argues, “is *itself* a political system, a particular power structure of formal or informal rule, socioeconomic privilege, and norms for the differential distribution of material wealth and opportunities, benefits and burdens, rights and duties.”<sup>139</sup>

Significantly, Mills defines the Racial Contract along three dimensions—the descriptive, the normative, and the epistemological. As Mills explains, the Racial Contract is a “set of formal or informal agreements or meta-agreements” that categorize a “subset of humans as ‘nonwhite’ and of a different and inferior moral status, subpersons, so that they have a subordinate civil standing in the white or white-ruled polities.”<sup>140</sup> As a result, “the moral and juridical rules normally regulating the behavior of whites in their dealings with one another either do not apply at all in dealings with nonwhites or apply only in a qualified form . . . , but in any case the general purpose of the Contract is always the differential privileging of the whites as a group with respect to the nonwhites as a group, the exploitation of their bodies, land, and resources, and the denial of equal socioeconomic opportunities to them.”<sup>141</sup> This Contract explains “how society was created or crucially transformed, how the individuals in that society were reconstituted, how the state was established, and how a particular moral code . . . [was] brought into existence.”<sup>142</sup>

For Mills, the Racial Contract is grounded in a “*preexisting* objectivist morality (theological or secular) . . . [that] constrains the terms of the political contract.”<sup>143</sup> This “color-coded morality” in turn “restricts the possession of . . . natural freedom and equality to *white* men.”<sup>144</sup> So, the Racial Contract, Mills argues, “requires its own peculiar moral and empirical epistemology, its norms and procedures for determining what

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<sup>137</sup> Charles W. Mills, *The Racial Contract* 18 (1997).

<sup>138</sup> *Id.* at 1.

<sup>139</sup> *Id.* at 3.

<sup>140</sup> *Id.* at 11.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 10.

<sup>143</sup> *Id.* at 14.

<sup>144</sup> *Id.* at 16.

counts as moral and factual knowledge of the world.”<sup>145</sup> White supremacy and black inferiority become background “facts” from which inferences are drawn. These purportedly factual claims require people to *misinterpret* the world in a way “validated by white epistemic authority. . . .”<sup>146</sup> As Mills notes, the Racial Contract “prescribes for its signatories an inverted epistemology, an epistemology of ignorance, a particular pattern of localized and global cognitive dysfunctions (which are psychologically and socially functional), producing the ironic outcome that whites will in general be unable to understand the world they themselves have made.”<sup>147</sup> In short, the very notion of “whiteness”—developed over hundreds of years and associated with profound social, political, and economic consequences—depends on “structured blindness” to conquer, enslave, and dominate non-white peoples.<sup>148</sup>

This notion of a “Racial Contract” with its particular moral code or moral psychology begin to explain Justice Story’s ambivalence toward slavery in *Prigg*. The vocabulary of classical racialism provided the foundation—the “facts”—that allowed institutions like slavery to exist in America despite a burgeoning democratic polity committed to freedom and equality. Classical racialism took black inferiority as a given. This vocabulary of inferiority permeated the late eighteenth- and nineteenth-century understandings of race. As I have said elsewhere, “our use of language conditions our understanding of ourselves. Language can . . . open up or shut down possibilities of being, doing, and understanding. . . . The languages we inherit, the ones we create, and the ones we discard all tell us something important about who we are and what our possibilities are.”<sup>149</sup> Justice Story was defined by and helped to define the racial vocabulary of his day.

For Justice Story and his contemporaries, the vocabulary of classical racialism had both interpretive and expressive implications.<sup>150</sup> As an interpretive matter, this vocabulary allowed the public to understand the world in racist terms that reduced human variety to crude stereotypes.<sup>151</sup> Hence, blacks as uncivilized, immoral, and incorrigibly ignorant

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<sup>145</sup> *Id.* at 17.

<sup>146</sup> *Id.* at 18.

<sup>147</sup> *Id.* (emphasis in original).

<sup>148</sup> *See id.* at 19.

<sup>149</sup> Ronald S. Sullivan Jr., *Multiple Ironies: Brown at 50*, 47 How. L.J. 29, 50 (2003). *See also* Martin Heidegger, *Letter on Humanism*, in *Basic Writings* 217, 217 (David Farrell Krell ed., 1993); Taylor, *supra* note 11, at 4 (Language “is the medium of human culture and cognition.”).

<sup>150</sup> *See* Taylor, *supra* note 11, at 4–7.

<sup>151</sup> *See id.*

became the popular lens through which an entire people was understood. As an expressive matter, classical racialism signified “the conditions under which certain inhabitants of what became the United States were considered subhuman, and hence fit to be treated as property, while others were considered an archaic model of humanity . . . , and hence fit to be uprooted and pushed aside by the advance of civilization.”<sup>152</sup> The interpretive and expressive aspects of classical racialism together effected not only the most intimate of interpersonal relationships, but also “the grandest of geopolitical policy choices.”<sup>153</sup> As for Justice Story, the vocabulary of classical racialism permitted him to see the world counterfactually, to conceive of blacks as biologically inferior, and to give insufficient concern to their claims to freedom.

This vocabulary, animated by the epistemology of ignorance, treated the non-white population as inevitably inferior, both morally and intellectually, and permitted slavery and freedom, independence and colonialism, egalitarianism and domination to co-exist in relative harmony. Justice Story’s opinion in *Prigg* reflects the foundations of classical racialism laid by Thomas Jefferson approximately sixty years earlier. Classical racialism offers a way to reconcile Jefferson the slave holder with Jefferson the freedom fighter and to square Jefferson’s writings on the equality of all men with his “suspicions” of black inferiority.<sup>154</sup> For both Story and Jefferson, political debates about the treatment of non-white populations took the form of contemporary arguments on, say, the treatment of animals, not arguments about persons with equally valued moral claims to humane treatment.

Classical racialism did not irredeemably infect the thinking of every late eighteenth- and early nineteenth-century American. Some, but not all, abolitionist counter-narratives were in tension with accounts of blacks as less than fully human. Hence, Jefferson had “suspicions” rather than “knowledge” of black inferiority, and Justice Story experienced moral ambiguity rather than moral certainty about slavery’s correctness. The influence of classical racialism is absent in the many critiques of the decision in *Prigg*. That Justice Story was morally ambivalent about the effects of slavery is consistent both with the preponderant Enlightenment racial discourse and his conspicuous silence on the slavery issue outside of the national annexation debates. Justice Story’s dilemma grew out of a racial discourse that could not imagine blacks as equal, regardless of whether they were free.

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<sup>152</sup> *Id.* at 6.

<sup>153</sup> *Id.* at 7.

<sup>154</sup> Jefferson’s masculinist formulations are, quite obviously, problematic on grounds of gender equality. Although I limit my project here to race and the law, this does not diminish the legitimacy of gender critiques that could be lodged.



### *Conclusion*

In the end, *Prigg* is a tale of two stories. Not only does *Prigg* tell the story of Margaret Morgan's journey from freedom to slavery, but it also tells a story about one of our most respected Supreme Court justices. For centuries now, race has insinuated itself into almost all of our human relationships. In Justice Story's era, race was conceptualized in the most rigidly essentialist vocabularies, and his ambivalence toward the slavery question derived from the racial vocabulary of his day, which relegated blacks to a sub-human, typologically distinct category. That Margaret Morgan and her children's fate were lost somewhere in the interstices of history epitomizes this lack of regard for or interest in the sufferings of the black community. At a minimum, Margaret Morgan's story reminds us that the law, like every other human institution, is informed, to varying degrees, by the social ethos. Classical racialism not only affected economic and immigration policy, but it framed the very background assumptions that allowed an institution as heinous as slavery to receive continued sanction under law. Subordination and stratification became the price of a shared national identity—a cruel truth that was framed not as a choice but as an inescapable reality.

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